

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

TONY EZZERRET MASON  
(TDCJ No. 1410494),

Petitioner,

V.

LORIE DAVIS, Director  
Texas Department of Criminal Justice  
Correctional Institutions Division,

Respondent.

No. 3:20-cv-475-E-BN

## FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Tony Ezzerret Mason, a Texas prisoner, filed a *pro se* application for writ of habeas corpus under 28 U.S.C. § 2254. *See* Dkt. Nos. 3 & 4. His action was referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge Ada Brown. The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should dismiss the habeas application with prejudice as time-barred under Rule 4 of the Rules Governing Section 2254 Cases.

## Applicable Background

Through his habeas petition, Mason challenges his Ellis County convictions for capital murder (in which the State did not seek the death penalty) and for intentional serious bodily injury to a child, under which he received a sentence of life imprisonment without parole. *See State v. Mason*, No. 30506CR (40th Dist. Ct., Ellis

Cnty., Tex.). These criminal judgments were affirmed on direct appeal in 2007. *See Mason v. State*, 237 S.W.3d 800 (Tex. App. – Waco 2007, pet. ref’d); Dkt. No. 3 at 3. And the Texas Court of Criminal Appeals (the “CCA”) denied his petition for discretionary review in 2008. *See Mason v. State*, PD-1686-07 (Tex. Crim. App. Mar. 12, 2008); Dkt. No. 3 at 3.

Mason later sought state habeas relief. And the CCA denied his first state application without written order in 2012, *see Ex parte Mason*, WR-77,360-01 (Tex. Crim. App. Apr. 4, 2012), and, more recently, denied his second state application as an abuse of the writ, *see Ex parte Mason*, WR-77,360-02 (Tex. Crim. App. Oct. 23, 2019).

After reviewing Mason’s Section 2254 application, the Court recognized that this action is likely time-barred and issued a questionnaire [Dkt. No. 5] to provide Mason fair notice of the limitations issues and to allow him to present his positions as to those issues through a verified response to the questionnaire. The Court docketed his response on March 31, 2020. *See* Dkt. No. 8.

## **Legal Standards**

### **I. Limitations**

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of

direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – “a discretionary doctrine that turns on the facts and circumstances of a particular case,” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in “rare and exceptional circumstances,” *United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, “[a] petitioner’s failure to satisfy the statute of

limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This "prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond [the litigant's] control." *Menominee Indian Tribe*, 136 S. Ct. at 756 (emphasis in original).<sup>1</sup>

But "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

A showing of "actual innocence" can also overcome AEDPA's statute of limitations. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). The applicable evidence must therefore show that "no juror, acting reasonably, would have voted to find him guilty

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<sup>1</sup> See, e.g., *Farmer v. D&O Contractors*, 640 F. App'x 302, 307 (5th Cir. 2016) (per curiam) (holding that because "the FBI did not actually prevent Farmer or any other Plaintiff from filing suit" but instead "advised Farmer that filing suit would have been against the FBI's interest" and "that the RICO claims could be filed after the investigation concluded," "[a]ny obstacle to suit was ... the product of Farmer's mistaken reliance on the FBI, and a party's mistaken belief is not an extraordinary circumstance" (citing *Menominee Indian Tribe*, 136 S. Ct. at 756-57)).

beyond a reasonable doubt.” *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).<sup>2</sup>

## II. Rule 4 Disposition

Under Rule 4 of the Rules Governing Section 2254 Cases, a district court may summarily dismiss a 28 U.S.C. § 2254 habeas application “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” *Id.*

This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in “the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.”

*Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes). In *Kiser*, clearly applicable here, the United States

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<sup>2</sup> See also *Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) (“The Supreme Court has made clear that the term ‘actual innocence’ means *factual*, as opposed to *legal*, innocence – ‘legal’ innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas ‘actual’ innocence, as the Court stated in *McCleskey [v. Zant]*, 499 U.S. 467 (1991)], means that the person did not commit the crime.” (footnotes omitted)); *Acker v. Davis*, 693 F. App’x 384, 392-93 (5th Cir 2017) (per curiam) (“Successful gateway claims of actual innocence are ‘extremely rare,’ and relief is available only in the ‘extraordinary case’ where there was ‘manifest injustice.’ *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, ‘old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.’ *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations omitted). ‘Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.”’ *Id.* (quoting *Schlup*, 513 U.S. at 329). ‘The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.’ *Id.*” (citations modified)).

Court of Appeals for the Fifth Circuit held that, “even though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional, the magistrate judge and district court did not err by raising the defense *sua sponte*.” *Id.* at 329 (noting the district court’s “decision to do so was consistent with Rule 4 and Rule 11 of the Rules Governing Section 2254 cases, as well as the precedent of this Court”).

But, “before acting on its own initiative’ to dismiss an apparently untimely § 2254 petition as time barred, a district court ‘must accord the parties fair notice and an opportunity to present their positions.’” *Wyatt v. Thaler*, 395 F. App’x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original); *see also Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at \*1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge’s report and recommendation also gives the parties “fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation” (collecting cases)).

### Analysis

Mason urges the Court to consider his current claims under the actual innocence gateway. *See* Dkt. No. 3 at 9; Dkt. No. 4; Dkt. No. 8; *see, e.g.,* Dkt. No. 8 at 5 (“Petitioner’s untimely filing of the current Federal Petition is overcome due to the Actual-Innocence Exception. Petitioner contends that he was denied Due process by denial of his fundamental right to Impartial Judge. The Petitioner has new evidence in support of his claim (exhibit a [Dkt. No. 4 at 25-46]) and is entitled to relief ....”).

Comments that the judge made to the jury at Mason’s trial were the sole issue

on his direct appeal. *See, e.g., Mason*, 237 S.W.3d at 806 (Vance, J., dissenting) (“I dissent because I believe the trial judge’s comments to the jury panel vitiated the presumption of innocence. ... In a single issue and relying solely on *Blue v. State*, Mason says the trial judge destroyed the presumption of innocence when he admonished the jury panel. *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000). The State says that *Blue* is ‘not controlling precedent,’ so Mason waived his complaint, and that *Blue* is factually distinguishable from the case at hand. The majority opinion reviews the statements Mason complains of, but inexplicably concludes that he has failed to preserve a complaint for review.”).

And Exhibit A to Mason’s untimely federal petition consists of newspaper articles concerning other trials. One article, *Bully on the Bench*, published by the Dallas Observer on April 12, 2007, concerns his trial judge. *See* Dkt. No. 4 at 33-46.

That this article was published before Mason’s convictions became final for purposes of the AEDPA, not to mention the article’s marginal relevance, compels the conclusion that Mason’s evidence is not new, much less is it new and reliable evidence sufficient to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Schlup*, 513 U.S. at 329.

This action should therefore be dismissed with prejudice as time-barred.

### **Recommendation and Direction to the Clerk of Court**

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss the application for a writ of habeas corpus with prejudice because it is time-barred. The Court should direct that the Clerk of Court serve any order accepting this

recommendation on the Texas Attorney General. The Clerk of Court is DIRECTED to serve electronically a copy of this recommendation and the petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent and will be directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See* RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: April 2, 2020

  
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DAVID L. HORAN  
UNITED STATES MAGISTRATE JUDGE